Kentucky Journal of Equine, Agriculture, & Natural Resources Law

Volume 4 | Issue 2 Article 6

2012

The Bait and Switch: Equitable Estoppel and Mine Safety and Health Administration Jurisdiction

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THE BAIT AND SWITCH: EQUITABLE ESTOPPEL AND MINE SAFETY AND HEALTH ADMINISTRATION JURISDICTION

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"Law as a guide to conduct is reduced to the level of mere futility if it is unknown and unknowable." Benjamin N. Cardozo, *The Growth of the Law* 3 (1924).

I. INTRODUCTION

Legal standards that aspire to alter an actor's behavior must be readily ascertainable by that actor to be effective. This concept is not novel. The U.S. Constitution explicitly forbids bills of attainder and ex post facto laws.[1] Laws that are too vague for the ordinary citizen to understand will be struck down under the void for vagueness doctrine.[2] A law or regulation that is clear regarding the regulated behavior may produce a similar problem if the law or regulation applies only to a specified group or activity that is not described with sufficient clarity. A clearly drafted law or regulation is of little help to someone that is unable to ascertain whether he or she is obligated to observe it. The current jurisdictional split between the Occupational Safety and Health Administration (OSHA) and the Mine Safety and Health Administration (MSHA) presents such a problem.

Worksites are subject to MSHA jurisdiction only if they fall within the statutory definition of "coal or other mine"[3] but are otherwise subject to OSHA jurisdiction.[4] This long, unwieldy, and cryptic definition[5] constantly gives rise to questions regarding which agency has jurisdiction.[6] MSHA has domain over core mining activities and, arguably, some activities, such as road and dam building, that have an attenuated (at best) connection to core mining activities.[7] Regulated parties on the fringe are often unable to

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* Online Editor, *Kentucky Journal of Equine, Agriculture, and Natural Resources Law*, 2011-2012; J.D. Expected May 2012, University of Kentucky College of Law.

[1] U.S. Const. art. I, § 9.

[2] *See generally* City of Chicago v. Morales, 527 U.S. 41(1999).

[3] 30 U.S.C. § 802(h)(1) (2006) (providing the definition of "coal or other mine").

[4] Michael T. Heenan, *What Sets MSHA and OSHA Apart?*, PIT & QUARRY (Sept. 1, 2007), http://www.pitandquarry.com/government/laws-regulations/what-sets-msha-and-osha-apart.

[5] *See* 30 U.S.C. § 802(h)(1) (2006).

[6] Heenan, *supra* note 4.

[7] *See e.g.*, MSHA v. RBK Constr., 15 FMSHRC 2099 (1993) (public highway cut); MSHA vs. Dillingham Constr. Int'l, 11 FMSHRC 1351 (1989) (dam building operation); MSHA v. Drillex, Inc., 16 FMSHRC 2391 (1994) (road building operation); MSHA v. S. Nevada Paving, 30 FMSHRC 567 (2008) (residential construction site).

determine, prior to being cited for non-compliance, whether they are subject to MSHA or OSHA regulations.[8]

In an effort to stymie the confusion, OSHA and MSHA entered into an Interagency Agreement explaining that MSHA has jurisdiction over mine sites and mineral milling operations while OSHA has jurisdiction in all other instances.[9] Further, in its Program Policy Manual, MSHA interpreted the Interagency Agreement to mean that MSHA has jurisdiction where the purpose of an operation is to produce or extract a mineral, but not where mineral extraction is incidental to the primary purpose of the activity.[10] Regrettably, these commendable efforts to provide clarity in an otherwise uncertain regulatory environment may be cold comfort. On several occasions MSHA has successfully taken the position and/or benefited from determinations that the Policy Manual and/or Interagency Agreement is not binding on MSHA and cannot be relied upon by regulated parties.[11] This outcome is consistent with the prevailing view that the government is ordinarily not subject to the equitable defense of estoppel.[12] This note argues that MSHA should be estopped from asserting jurisdiction that it has disclaimed in the Policy Manual and/or Interagency Agreement.

Section II discusses the OSHA/MSHA regulatory regime with emphasis on the statutory jurisdiction of each and the internal efforts of the Department of Labor to harmonize their respective jurisdictional grants. Section III analyzes past jurisdictional disputes and offers these disputes as evidence that the current administrative regime has created an uncertain and sometimes unfair regulatory environment. Section IV observes and questions the policy that equitable estoppel is currently not available in any capacity as a defense in MSHA regulatory enforcement proceedings. Section V concludes that public policy would be better served by a cautious acceptance of equitable estoppel as a defense in this context. Allowing the

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[8] *See* Heenan, *supra* note 4.

[9] OCCUPATIONAL HEALTH & SAFETY ADMIN., INTERAGENCY AGREEMENT BETWEEN THE MINE SAFETY AND HEALTH ADMINISTRATION U.S. DEPARTMENT OF LABOR AND THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION U.S. DEPARTMENT OF LABOR, (Mar. 29, 1979), *available at* http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=MOU&p_id=222 [hereinafter INTERAGENCY AGREEMENT].

[10] MINE SAFETY & HEALTH ADMIN., PROGRAM POLICY MANUAL: INTERPRETATIONS AND GUIDELINES ON ENFORCEMENT OF 1977 THE ACT, 3 (Feb. 2003), *available at* http://www.msha.gov/regs/complian/ppm/PDFVersion/PPM%20Vol%20I.pdf [hereinafter PROGRAM POLICY MANUAL].

[11] *See Dillingham*, 11 FMSHRC at 1387 ("[S]uch policy memorandums are not binding on the Commission and may not supercede the plain jurisdictional language found in the Act, and the controlling case precedents"); *See also Drillex*, 16 FMSHRC at 2394 ("[The Secretary] also contends that the judge correctly distinguished Drillex's operation from a borrow pit and that, in any event, the Interagency Agreement is not legally binding on the Secretary.").

[12] *See* Office of Personnel Management v. Richmond, 496 U.S. 414, 423-424, 110 S. Ct. 2465, 2471, 110 L. Ed. 2d 387 (1990) (observing the general rule that "equitable estoppel will not lie against the Government as it lies against private litigants" but refusing to "embrace a rule that no estoppel will lie against the Government").

defense would work minimal hardship on the public interest in ensuring occupational safety and health and would produce a regulatory environment with greater efficiency and more predictable results.

II. THE OSHA/MSHA REGULATORY REGIME

A. MSHA Statutory Jurisdiction

The Mine Act established the Mine Safety and Health Administration (MSHA) and governs its activities.[13] Under the Mine Act, "[e]ach coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to [MSHA Jurisdiction]."[14] Thus, the jurisdictional reach of MSHA hinges on: (1) interstate commerce, and (2) the definition of "coal or other mine". Fortunately, the Mine Act defines "coal or other mine:"

> "Coal or other mine" means (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities. In making a determination of what constitutes mineral milling for purposes of this chapter, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment.[15]

Perhaps not so fortunately, the definition is self-evidently broad. However, Congress explicitly intended "coal or other mine," and consequently

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[13] 30 U.S.C. §§ 801–965 (2006).
[14] 30 U.S.C. § 803 (2006).
[15] 30 U.S.C. § 802(h)(1) (2006).

MSHA's jurisdictional grant, to be interpreted as broadly as possible.[16] The dividing line between OSHA and MSHA jurisdiction is composed of the stated Congressional intent to confer broad jurisdiction on MSHA and the foregoing definition of "coal or other mine." It is, accordingly, also the dividing line between an obligation to comply with OSHA regulations and an obligation to comply with MSHA regulations.

B. OSHA Statutory Jurisdiction

The Occupational Safety and Health Act of 1970[17] established and delineates the authority of the Occupational Safety and Health Administration (OSHA). In establishing OSHA Congress sought "through the exercise of its powers to regulate *commerce* among the several States and with foreign nations and to provide for the general welfare, to assure so far as possible *every working man and woman* in the Nation safe and healthful working conditions and to preserve our human resources."[18] The precise reach of OSHA jurisdiction is beyond the scope of this note. It is sufficient to observe from the foregoing that OSHA's jurisdictional grant is broader than MSHA's jurisdictional grant. It may be useful to think of OSHA standards as providing default occupational health standards and MSHA standards as preemptive of those default standards when its jurisdiction is triggered. That is, if a particular activity falls within the definition of "coal or other mine,"[19] then MSHA standards apply; if it does not, then OSHA has jurisdiction. Accordingly, if MSHA is deprived of jurisdiction in a given case, the result is not an utter lack of occupational health standards; rather, the result is that OSHA occupational health standards apply.

C. The Difficulty of Overlapping Jurisdiction

The basic relationship between OSHA and MSHA jurisdiction is that, at least with regard to occupational hazards, "MSHA has jurisdiction over safety and health at mines," and "OSHA has jurisdiction over just about everything else."[20] The key to defining jurisdiction here is the comprehensive, if not cryptic, definition of "coal or other mine"[21]. "Congress foresaw that this definition might spawn turf battles between

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[16] *See Marshall v. Stoudt's Ferry Preparation Co.*, 602 F.2d 589, 592 (3d Cir. 1979) ("Commenting on this sweeping definition, the Senate Committee stated that 'what is considered to be a mine and to be regulated under this Act' was to be given the broadest possible interpretation and that doubts were to be resolved in favor of inclusion of a facility within the coverage of the Act.")

[17] 29 U.S.C. §§ 651-678 (2006).

[18] 29 U.S.C. § 651(b) (2006) (emphasis added).

[19] 30 U.S.C. § 802(h)(1) (2006).

[20] Heenan, *supra* note 4.

[21] 30 U.S.C. § 802(h)(1) (2006).

MSHA and its sister agency OSHA, or confusion on the part of employers."[22] Accordingly, Congress, in its jurisdictional grant to MSHA, advised that the Secretary of Labor, when facing confusion, should give "due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment."[23] What followed was an Interagency Agreement between OSHA and MSHA intended to guide employers and employees, delineate the sphere of influence of each agency, and serve as a mechanism for settling competing claims of jurisdiction.[24]

D. The OSHA/MSHA Interagency Agreement

MSHA and OSHA entered into an Interagency Agreement "to set forth the general principle and specific procedures that will guide MSHA and OSHA," and to "serve as guidance to employers and employees in the affected industries in determining the jurisdiction of the two statutes involved."[25] The general principal of the agreement is that MSHA rules apply with regard to unsafe and unhealthful working conditions on mine sites and mineral milling operation sites while OSHA rules apply in all other contexts.[26] When addressing any questions of conflicting jurisdiction, the relevant MSHA District Manager and OSHA Regional Administrator should first attempt to resolve the conflict at the local level by considering both the Interagency Agreement and any other relevant law and policy.[27] If the two aforementioned parties are unable to agree on the issue, the Interagency Agreement instructs them to refer the matter to the Secretary of Labor for a final decision.[28]

E. The MSHA Policy Manual

MSHA's Policy Manual interprets the Interagency Agreement to mean that "MSHA has jurisdiction over operations whose purpose is to extract or to produce a mineral. [But] MSHA does not have jurisdiction where a mineral is extracted incidental to the primary purpose of the activity."[29] Continuing with that theme, the Policy Manual provides:

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[22] *MSHA Jurisdiction: Where, Oh Where, Will It End?*, CROWELL & MORING MINING LAW MONITOR, http://www.crowell.com/NewsEvents/Publications/Articles/1350057 (last visited Mar. 27, 2012).

[23] *Id.*

[24] INTERAGENCY AGREEMENT, *supra* note 9.

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] PROGRAM POLICY MANUAL, *supra* note 10.

> Under this circumstance, a mineral may be processed and disposed of, and MSHA will not have jurisdiction since the company is not functioning for the purpose of producing a mineral. Operations not functioning for the purpose of producing a mineral include, but are not limited to, the following: (1) key cuts in dam construction (not on mining property or used in mining); (2) public road and highway cuts; (3) tunnels, a. railroad, b. highway, c. water diversion, etc.; (4) storage areas, a. gas, b. petroleum reserves, c. high and low level radioactive waste. The question of jurisdiction in these and similar types of operations is contingent on the purpose and intent for which the facility is being developed.[30]

This formulation of MSHA jurisdiction is elegant. It also has the practical advantage of keeping core mining activities squarely within MSHA's jurisdiction and excluding activities that have only an attenuated connection with mining. Further, it lends itself to relatively predictable outcomes.

III. JURISDICTIONAL DISPUTES

A. The Definition of "Coal or Other Mine"

The case law and administrative decisions are replete with examples of the difficulty that the present jurisdictional framework between OSHA and MSHA has engendered. For example, in *Pennsylvania Electric Co. v. Fed. Mine Safety & Health Review Comm'n*, the court faced the question of whether MSHA or OSHA had jurisdiction in connection with the handling and processing of coal in an electric generating plant in Homer City, Pennsylvania.[31] In that case, the plant, using conveyor belts, transported coal from two adjacent mines to a processing facility that prepared the coal for use in the plant.[32] Thereafter, the conveyors took the coal to the plant for use in generating electricity.[33]

The dispute in *Pennsylvania* centered on whether MSHA had jurisdiction over the conveyer belts used to transport the processed coal from the processing facility to the plant.[34] MSHA had been regulating the processing facility itself since 1977, but had never before exercised jurisdiction over the off-site conveyers used to carried processed coal to the

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[30] *Id.*

[31] Pennsylvania Electric Co. v. Fed. Mine Safety & Health Review Comm'n, 969 F.2d 1501, 1502 (3d Cir. 1992).

[32] *Id.* at 1503.

[33] *Id.*

[34] *Id.*

electric plant.[35] Accordingly, the plant argued that OSHA, and not MSHA regulations, applied inasmuch as the conveyer belts were not a "coal or other mine" covered by the Mine Act.[36] The court had little difficulty concluding that the conveyer system fell within the statutory definition of "coal or other mine" because the statutory definition provides that "structures, facilities, equipment, machines, tools or other property . . . used in, or to be used in, or resulting from, . . . the work of preparing coal" are included.[37] Thus, according to the court, the plain language of the Mine Act controlled the outcome of the case.[38]

In *Herman v. Associated Electric Coop.*, a divided panel of the 8th Circuit Court of Appeals reversed the District Court's decision to uphold MSHA jurisdiction over another electric power plant.[39] The electric plant, in Missouri, purchased coal that was delivered to it by rail from two mines in Wyoming.[40] After receiving the coal, the plant prepared the coal for combustion using several processes such as crushing the coal and screening the coal to remove metal debris.[41] Upon receiving complaints regarding coal dust at the facility, an OSHA inspector conducted a preliminary air quality inspection and referred the matter to MSHA for a determination of which entity had regulatory authority over the plant.[42] The controversy in this case arose when the plant denied access to an MSHA inspector on the grounds that OSHA, not MSHA, had the authority to regulate the plant's activities.[43]

MSHA followed roughly the same pattern that it had success with in *Pennsylvania Electric Co.*, arguing that the coal processing activities that took place at the electric plant amounted to "the work of preparing coal", which falls within the Mine Act's definition of "coal or other mine".[44] That definition also includes "the breaking, crushing, sizing, cleaning, washing, drying, mixing, storing, and loading of bituminous coal, lignite, or anthracite, and such other work of preparing such coal as is usually done by the operator of the coal mine".[45] Because the power plant's activities indisputably did involve crushing, breaking, sizing, and cleaning the coal, the District Court, relying in part on the decision in *Pennsylvania Electric*

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[35] *Id.*
[36] *Id.*
[37] *Pennsylvania. Electric Co.*, 969 F.2d at 1503 (quoting 30 U.S.C. § 802(h)(1)).
[38] *Id.* at 1504.
[39] Herman v. Associated Electric Coop., Inc., 172 F.3d 1078, 1080 (8th Cir. 1999).
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] Herman v. Associated Electric Coop., Inc., 994 F. Supp. 1147, 1552-53 (E.D. Mo. 1998), *rev'd*, 172 F.3d 1078 (8th Cir. 1999); *see also Pennsylvania Electric Co.*, 969 F.2d 1501 (holding that a conveyor system used to carry coal to an electricity plant was under MSHA's regulatory jurisdiction).
[45] *Herman*, 994 F. Supp. at 1153 (quoting 30 U.S.C. § 802(i) (2006)).

Co., was satisfied that the activities of the power plant were covered by the definition of "coal or other mine" in the Mine Act.[46]

Unlike the district court, the 8th Circuit Court of Appeals was not convinced that the power plant's crushing and sizing of coal, which it had purchased from a coal mine in Wyoming, was sufficient to trigger MSHA jurisdiction.[47] According to the divided panel, not all businesses that perform tasks listed under "the work of preparing coal" in the Mine Act can be considered mines without MSHA jurisdiction extending to unfathomable lengths.[48] Accordingly, the court, explicitly disagreeing with the 3rd Circuit, held that the power plant's coal processing operations would remain subject to OSHA jurisdiction.[49]

Bush & Burchett, Inc. v. Reich is another example of a turf battle between MSHA and OSHA.[50] In this case Heartland Resources had a contract with Bush & Burchett, Inc. to have a bridge built over the Guyandotte River in West Virginia.[51] Heartland Resources needed the bridge to connect a coal mine on one side of the river to a railroad loadout facility on the other side of the river.[52] Heatland agreed that upon completion it would convey the bridge to the West Virginia Department of Transportation to integrate the bridge into the state's road system.[53] Following two fatalities during bridge construction and a union complaint respectively, OSHA inspected the bridge site and issued citations on June 20, 1991 and September 4, 1991.[54] Heartland Resources believed that MSHA did not have jurisdiction over the bridge construction site.[55] MSHA initially agreed with Heartland Resources' belief but later issued a citation to Heartland Resources on September 10, 1991 for failure to berm the haul road from the mine site down to the bridge, as was required by MSHA regulations.[56] Heartland Resources remedied the matter by installing the berms, but subsequently removed them in response to a letter from the West Virginia Department of Transportation indicating that the berms were causing erosion and drainage problems.[57]

Heartland Resources challenged OSHA's authority, asserting that OSHA's jurisdiction over the bridge site had been preempted by MSHA.[58] Heartland Resources' argument was supported by the fact that MSHA was

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[46] *Id.* at 1154.
[47] *Herman*, 172 F.3d at 1083.
[48] *Id.* at 1082 (internal citation omitted).
[49] *Id.* at 1083.
[50] Bush & Burchett, Inc. v. Reich, 117 F.3d 932 (6th Cir. 1997).
[51] *Id.* at 933.
[52] *Id.*
[53] *Id.* at 934.
[54] *Id.* at 935.
[55] *Id.* at 934.
[56] *Bush & Burchett, Inc.*, 117 F.3d at 934.
[57] *Id.*
[58] *Id.* at 933.

the most recent agency to take regulatory action.[59] Heartland Resources argued that the bridge construction site was a "[road] appurtenant to" an area where minerals were extracted and, therefore, covered by the text of the definition of "coal or other mine" in the Mine Act.[60] The court conceded that Heartland Resources' argument had merit because of the expansive definition of "coal or other mine," but nonetheless rejected the argument because "it was contrary to common sense."[61] The court explained that, if Heartland Resources' argument were credited, then "MSHA jurisdiction could conceivably extend to unfathomable lengths since any road appurtenant to a mine that connects to the outside world would necessarily run into yet other roads, thus becoming one contiguous road."[62] Accordingly, the court upheld the citations OSHA issued to Heartland Resources.[63]

B. The Interagency Agreement & MSHA Policy Manual

Jurisdictional disputes do not hinge only on the definition of "coal or other mine," sometimes sub-legislative policy like the Interagency Agreement and the MSHA Policy Manual comes into play. For example, in *MSHA vs. RBK Construction*, MSHA issued citations to RBK Construction for failure to adhere to MSHA regulations in performing a contract with the Nevada Department of Transportation to do a "cut and fill" operation, or road construction.[64] In defense of the citations, RBK Construction asserted that any mineral extraction in which had engaged was incidental to the primary purpose of finishing the public highway cut.[65] RBK Construction argued, therefore, that MSHA did not have jurisdiction over the highway cut pursuant to the Interagency Agreement and the provisions of the MSHA Policy Manual disclaiming MSHA jurisdiction over mineral extraction incidental to the primary purpose of the activity.[66]

Upon review of the matter, the Secretary of the Department of Labor agreed that any mineral extraction was incidental to the primary purpose and elected to vacate the citations against RBK Construction.[67] The administrative law judge, however, determined that the Secretary was without authority to vacate the citations because the highway cut met the statutory definition of a "coal or other mine."[68] In the subsequent

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[59] *See id.* at 934-35.
[60] *Id.* at 936-37.
[61] *Id.* at 937.
[62] *Bush & Burchett, Inc.*, 117 F.3d at 937.
[63] *Id.* at 940.
[64] MSHA v. RBK Constr., 15 FMSHRC 2099, 2099 (1993)
[65] *Id.*
[66] *See id.*
[67] *Id.*
[68] *Id.* at 2100.

interlocutory appeal to the Federal Mine Safety and Health Review Commission (The Commission),[69] the administrative law judge's order denying MSHA's motion to dismiss was overruled.[70] The Commission did not object to the Administrative Law Judge's characterization of the cut and fill operation as a "coal or other mine" subject to MSHA jurisdiction; rather, it concluded that, notwithstanding whether the operation was or was not a mine, the Secretary was acting within his discretion in vacating the citations.[71]

The Commission addressed the MSHA Policy Manual again in *MSHA v. Dillingham Construction International*.[72] The Army Corps of Engineers and the Puerto Rican government hired Dillingham Construction International (Dillingham) to construct a dam.[73] During the dam building operations, Dillingham was issued citations by MSHA inspectors.[74] Subsequently, Dillingham asserted that MSHA's jurisdiction was not triggered because there was no "coal or other mine" and that any mineral mining was only incidental to the primary purpose of the activity, dam building.[75]

The MSHA Policy Manual includes "key cuts in dam construction" as mineral mining that is incidental to the primary purpose of the activity.[76] Given that its activity was explicitly listed as an example of incidental mineral extraction, one would think that Dillingham's argument would have been difficult for MSHA to overcome. However, MSHA countered that the dam site was chosen in part because of a nearby, abundant supply of limestone, which Dillingham would have to purchase on the open market if not obtained from the deposits nearby the dam construction site.[77]

The record demonstrated that Dillingham used the nearby limestone deposits in dam construction after preparing the material itself.[78] MSHA argued that, pursuant to the statutory definition of "coal or other mine," this activity constituted mineral milling and brought Dillingham's activities within the scope of the Mine Act.[79] The Commission agreed that

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[69] The Federal Mine Safety and Health Review Commission (FMSHRC) is related to, but independent of, the Mine Safety and Health Administration (MSHA). Broadly speaking, MSHA has policymaking and prosecutorial responsibility, such as responsibility for promulgating occupational safety and health standards and for prosecuting violations of those standards. The FMSHRC, on the other hand, has responsibility for adjudicating alleged violations of the safety and health standards promulgated and prosecuted by MSHA. Each entity exists independently of the other. Paul R. Verkuil, *The Purposes and Limits of Independent Agencies*, 1988 Duke L.J. 257, 268 (1988).

[70] *RBK Constr.*, 15 FMSHRC at 2101.

[71] *Id.*

[72] MSHA v. Dillingham Constr. Int'l, 11 FMSHRC 1351 (1989).

[73] *Id.* at 1351.

[74] *Id.* at 1352-54.

[75] *Id.* at 1352.

[76] *Id.* at 1382 (quoting MSHA, POLICY MEMORANDUM NO. 88-2M (Oct. 23, 1986)).

[77] *Id.* at 1386-87.

[78] *Dillingham*, 11 FMSHRC at 1387-88.

[79] *See id.* at 1386-87.

Dillingham's activities fell within the statutory definition and explicitly rejected Dillingham's reliance on the Policy Manual as follows:

> The respondent's reliance on the language found in the MSHA policy manual of July 1, 1988, which states that MSHA has jurisdiction only over operations whose purpose is to extract or to produce a mineral, and does not have jurisdiction where a mineral is extracted incidental to the primary purpose of the activity is rejected. In the first place, such policy memorandums are not binding on the Commission and may not supercede the plain jurisdictional language found in the Act, and the controlling case precedents. *Brock v. Cathedral Bluffs Shale Oil Co.*, BNA 4 MSHC 1033 (D.C. Cir. 1986). Further, as correctly pointed out by the petitioner, the limestone material extracted by the respondent is extracted for its intrinsic value as a commodity.... In short, the availability, extraction, processing, and use of the limestone is a critical part of the dam construction activity.[80]

Stated differently, the Commission held that MSHA could not be estopped by the language in its policy manual that disclaims jurisdiction over incidental mineral extraction.

The Commission addressed MSHA jurisdiction in the context of a residential construction site in *MSHA v. Drillex.*[81] Drillex had been hired to perform blasting, drilling, rock excavation, and crushing of excavated rock.[82] The rock was to be utilized as fill material for building a road in connection with a project to construct over two hundred residential units.[83] The Secretary argued that MSHA had jurisdiction over Drillex based on precedent indicating jurisdiction exists when minerals are excavated and separated for a particular use.[84] Drillex countered that there was no precedent in support of MSHA jurisdiction over a construction site where minerals were extracted only as an incident to the construction of roads for the project, and not for the inherent value of the materials extracted.[85]

"[D]espite the fact that the Project [was] far from what is viewed traditionally as a 'mine'," the Commission upheld MSHA jurisdiction over the site because there was at least some measure of mineral extraction,

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[80] *Id.* at 1387.
[81] *See generally* MSHA v. Drillex, Inc., 15 FMSHRC 1941 (1993).
[82] *Id.* at 1942.
[83] *Id.* at 1942-43.
[84] *Id.* at 1944 (internal citations omitted).
[85] *Id.*

preparation, or milling present.[86] The Commission observed that, pursuant to the Interagency Agreement, the essential operation in "milling" is the "separation of one or more valuable desired constituents of the crude from undesired contaminants with which it is associated."[87] The Commission explained that, because Drillex screened clay from the rock, sized it, and otherwise treated the rock as a "valuable desired constituent of the crude," it was engaged in "milling."[88] Finally, the Commission conceded that "that there is no precedent for the imposition of Mine Act jurisdiction at a construction project where minerals are extracted solely for road construction at the project -- a purpose incidental to the main objective of the project--," and countered that there is not "a prohibition of the exercise of Mine Act jurisdiction."[89]

The Commission addressed a regulated party's reliance on the Interagency Agreement again in *Southern Nevada Paving v. MSHA*.[90] Southern Nevada Paving (SNP) was a contractor working for Howard-Hughes Properties in connection with a large construction project in Summerlin, Nevada.[91] The project necessitated "excavating, landscaping, filling, grading, and preparing construction sites for residential buildings, commercial buildings, utilities, Beltway 215, and other roadways."[92] In addition, "scraping, excavating, loading, moving, and depositing spoil materials consisting of soils, shrubs, roots, trash, and organic and non-organic materials" were required.[93] SNP screened piles of the spoil to remove trash and organic material, crushed it, and then used it at the construction site for leveling and filling purposes or, in some instances, sold the material to sand and gravel customers.[94] MSHA argued that this activity constituted mineral milling and, therefore, that SNP's crushers were mines within the meaning of the Mine Act and MSHA jurisdiction was proper.[95] SNP countered that: (1) mere "operation of the crushers as an integral part of the construction project did not convert construction to mining," and (2) the crushing of the spoil material was not mineral milling within the meaning of the Interagency Agreement because it did not separate valuable mineral from worthless spoil and the end product contained no known mineral of value.[96]

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[86] *Id.* at 1945-47.
[87] *Drillex*, 15 FMSHRC at 1946.
[88] *Id.* at 1947.
[89] *Id.* at 1945.
[90] MSHA v. S. Nevada Paving, 30 FMSHRC 567 (2008).
[91] *Id.* at 568.
[92] *Id.*
[93] *Id.*
[94] *Id.* at 570-72.
[95] *Id.* at 572.
[96] *S. Nevada Paving*, 30 FMSHRC at 572-73

The Commission held that the crushing of material to make aggregate base is considered mineral milling under the Mine Act.[97] In doing so, the Commission rejected SNP's reliance on the Interagency Agreement's characterization of mineral milling as separating valuable mineral from worthless spoil, stating: "[i]n spite of the referenced language in Appendix A [of the Interagency Agreement], the Secretary has consistently interpreted the term milling to include milling operations in which the separation of valuable from valueless materials does not occur."[98] The Commission was satisfied that: (1) the only support for SNP's interpretation of the term mineral milling was the Interagency Agreement, and (2) nothing in the language of the Mine Act suggested that separation of valuable from valueless mineral was a prerequisite for mineral milling to occur.[99] Accordingly, the Commission sided in favor of MSHA.[100]

C. The Consequences of Jurisdictional Miscalculation Can be Severe

Under the current jurisdictional framework, it is often very difficult for regulated parties to know whether MSHA or OSHA has jurisdiction over their business activity. The consequences of a mistake can be significant and, in many cases, extend much further than the initial fines and penalties that may be assessed despite an attempt to comply with the wrong rule or a wayward interpretation of a rule. An example, is *Air Products & Chemicals v. MSHA,* MSHA had jurisdiction over a company that processed coal refuse.[101] The grounds for jurisdiction, i.e. the nature of the activity, were similar to those relied upon in *Pennsylvania Electric Co.*, where the court upheld MSHA jurisdiction over conveyer belts leading from a coal processing facility to a power plant.[102]

In *Air Products & Chemicals*, the defendants operated a plant that burned coal refuse to produce steam and electricity.[103] Coal refuse is composed of rock fragments unavoidably removed from the earth during the coal mining process and small amounts of coal not separated during processing. The primary source of these rocks and minerals is normally the formations immediately above and below the coal seam and the sediments within the seam.[104]

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[97] *Id.* at 574.
[98] *Id.*
[99] *Id.* at 572.
[100] *Id.* at 577.
[101] Air Prods. & Chems. v. MSHA, 15 FMSHRC 2428 (1993).
[102] *Id.* at 2431 (citing Pennsylvania Electric Co. v. FMSHRC, 969 F.2d 1501 (3d. Cir. 1992)).
[103] *Air Prods. & Chems.*, 15 FMSHRC at 2429.
[104] MINE SAFETY & HEALTH ADMIN., ENGINEERING AND DESIGN MANUAL: COAL REFUSE DISPOSAL FACILITIES, at 2-2 (2d ed. 2009), *available at* http://www.msha.gov/Impoundments/DesignManual/2009ImpoundmentDesignManual.pdf.

Prior to their building of the plant, an MSHA official informed the defendants that, based on the activity expected to take place there, MSHA would not have jurisdiction.[105] Accordingly, the defendants built the plant with OSHA specifications in mind and trained their employees to comply with OSHA standards.[106] After the construction was completed, OSHA conducted a routine inspection of the plant and issued citations.[107]

Roughly one year later, MSHA decided that the plant, or at least some areas of it, did fall within MSHA's statutory jurisdiction because the defendants were also processing the coal refuse and were therefore involved in the "work of preparing coal".[108] When the defendants challenged MSHA's jurisdiction, the Commission sided with MSHA, holding that at least some activity at the plant amounted to "the work of preparing coal."[109] The Commission was not persuaded by the administrative law judge's decision that MSHA jurisdiction was improper because it was exercised on an ad hoc and unilateral basis, rather than as the product of a reasoned resolution of the jurisdictional question with OSHA pursuant to the Interagency Agreement.[110] In a dissenting opinion, Chairmen Holen declared that:

> [I]f a coal consumer becomes a coal preparation facility within the meaning of [the Mine Act] by engaging in <u>any</u> of the activities listed in section 3(i), 30 U.S.C. § 802(i), the Mine Act potentially reaches every end user of coal. Such a broad interpretation is ultimately at odds with the legislative history of the Mine Act, which is directed to safety and health problems associated with <u>mining</u> activity.[111]

Chairmen Holen also expressed "concern that indications of conflicting safety enforcement authority by the Secretary of Labor through MSHA and OSHA create confusion, compromise safety and reduce productivity, as shifting policies force operators to modify facilities and work processes."[112] In the end, the defendants were left with a refuse plant designed to OSHA specifications, employees trained to comply with OSHA regulations, and MSHA jurisdiction over the refuse plant.

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[105] *Air Prods. & Chems.*, 15 FMSHRC at 2429.
[106] *Id.*
[107] *Id.*
[108] *Id.* at 2429-30.
[109] *Id.* at 2431.
[110] *Id.* at 2432.
[111] *Air Prods. & Chems.*, 15 FMSHRC at 2437 (Chairman Holen, dissenting).
[112] *Id.* at 2438 (internal citation omitted).

IV. EQUITABLE ESTOPPEL

A. Generally

The doctrine of equitable estoppel provides a possible theoretical basis for binding agencies to pronouncements like the Interagency Agreement and the MSHA Policy Manual.[113] If credited as a defense, equitable estoppel would forbid MSHA from taking inconsistent positions regarding its jurisdiction to the detriment of a party invoking the doctrine.[114] For example, a regulated party might claim that MSHA should be estopped from claiming that it has jurisdiction over mineral mining that is incidental to the primary purpose of the activity because this would be inconsistent with the pronouncement in the MSHA Policy Manual that MSHA does not have jurisdiction over such activity.

Invoking the doctrine of equitable estoppel against a governmental entity is very difficult.[115] In this context, "many courts view estoppel as an extraordinary remedy and will require some affirmative misconduct by the agency" as a precondition for a claim of equitable estoppel.[116] A prima facie case of equitable estoppel would, at a minimum, require the party seeking to invoke the doctrine to show the following: "(1) the government had knowledge of the facts, (2) the government intended that its conduct be acted upon or acted in a manner so that the party asserting the defense had a right to believe it so intended, (3) the party asserting the estoppel defense was ignorant of the true facts, and (4) that the party asserting the estoppel defense relied on the governments conduct to his or her detriment".[117]

On the basis of the foregoing factors, a regulated party that relied upon the MSHA Policy Manual and/or Interagency Agreement should have a convincing prima facie claim of estoppel in the ordinary case. First, it would seem as though MSHA is aware of the activity that is taking place and believes it has jurisdiction or else it would not be issuing citations. Second, it seems clear that MSHA intended for its representations to be relied upon because express language in the MSHA/OSHA Interagency Agreement, which the Policy Manual purports to interpret, provides that it is intended to guide "employers" and "employees."[118] Third, while it may be difficult for a regulated party to show in a given case that it was ignorant

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[113] *Regulation Without Rulemaking: The Force and Authority of Informal Agency Actio*n, 47 ROCKY MTN. MIN. L. INST. 5, at § 503(4)(d) (2001)

[114] *Id.*

[115] ROCKY MTN. MIN. L. INST., *supra* note 113, at § 503(4)(d). *See* CHARLES ALAN WRIGHT ET AL., *supra* note 13.

[116] ROCKY MTN. MIN. L. INST., *supra* note 113, at § 503(4)(d).

[117] Mary V. Laitos, Danielle V. Smith & Amy E. Mang, *Equitable Defenses Against the Government in the Natural Resources and Environmental Law Context*, 17 PACE ENVTL. L. REV. 273, 285 (2000) (citing United States v. Georgia-Pac. Co., 421 F.2d 92, 96 (9th Cir. 1970)).

[118] *See* INTERAGENCY AGREEMENT, *supra* note 9.

of the true facts, i.e. that reliance is reasonable, MSHA would at least be prevented from taking the position that the representations in its Policy Manual are a nullity. Lastly, detrimental reliance should not be difficult to establish in most cases because a citation will presumably have been issued and the regulated party will likely argue that fines/penalties could have been avoided if it had not relied to its detriment on the Policy Manual.

B. Equitable Estoppel is not a Viable Defense

Notwithstanding the foregoing, a brief and non-exhaustive review of cases, discussed below, in which equitable estoppel was raised as a defense tends toward an understanding that the defense is rarely, if ever, credited in MSHA enforcement proceedings. This is the expected result given general administrative and judicial reluctance to estop government entities.[119] Also, as we saw in *Dillingham Construction International*, the Commission has, on one occasion, declared explicitly that the MSHA Policy Manual cannot bind, or estop, MSHA from asserting jurisdiction.[120]

In *Emery Min. Corp. v. Sec'y of Labor*, the Commission determined that Emery had violated the miner training requirements of the Mine Act by failing to have an approved training plan in place and not providing the appropriate amount of training.[121] The Department of Labor had installed an administrative regulation, 30 C.F.R. § 48.8(a), that purported to require eight hours of refresher training "annually," as opposed to the "once each 12 months" requirement in the Mine Act.[122] When Emery was cited by MSHA for waiting over 15 months to provide refresher training to several of its employees, it argued that it was still in compliance with 30 C.F.R. § 48.8(a) because "annual" training only meant that it had to provide the refresher training at some point each calendar year rather than within 12 month intervals, as the text of the Mine Act would seemingly have required.[123]

The court acknowledged that "the record [reflected] some confusion surrounding MSHA's approval of Emery's training plan;" it appeared as though MSHA officials were aware of Emory's "annual" certification practice and acquiesced in it for at least two years.[124] However, the court squarely rejected Emery's estoppel claim:

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[119] Laitos, Smith & Mang, *supra* note 117, at 295.

[120] MSHA vs. Dillingham Constr. Int'l, 11 FMSHRC 1351, 1387 (1989).

[121] Emery Mining Corp. v. Sec'y of Labor, 744 F.2d 1411, 1413 (10th Cir. 1984) (citing 30 U.S.C. § 825).

[122] *Id.*

[123] *Id.* at 1414.

[124] *Id.* at 1415-16.

> Whatever their position within the agency, the MSHA officials who approved Emery's plan clearly had no authority to waive the Act's requirements and bind the government to what amounts to an amendment of the statutory language. Particularly where mandatory safety standards are concerned, a mine operator must be charged with knowledge of the Act's provisions and has a duty to comply with those provisions. To the extent Emery relied on an interpretation by MSHA officials of the Act's implementing regulations, Emery assumed the risk that that interpretation was in error.[125]

Thus, the court found no grounds for administrative estoppel either on the basis of C.F.R. § 48.8(a) or on the basis of representations made to Emory by MSHA officials.[126] It was, additionally, "far from clear [to the court] that the requirements for equitable estoppel [were] met in this case" because Emery received notice of MSHA's change in position on the interpretation of C.F.R. § 48.8(a) that training was required every 12 months.[127] The court held that Emery could have "acted promptly" to avoid being cited and, therefore, any continued reliance on any misrepresentations by MSHA was unreasonable and the principles of equitable estoppel were precluded.[128]

More pointed rejection of equitable estoppel as a viable defense in MSHA regulatory enforcement proceedings can be found in the decisions of the Commission. *King Knob Coal Co.* stands for the proposition that equitable estoppel ordinarily will not serve as a defense in MSHA enforcement proceedings.[129] In *King Knob Coal Co.* there was "a conflict between a mandatory safety and health standard and MSHA's purported interpretation of that standard in its interim inspector's manual."[130] King Knob Coal Co. argued that it was entitled to rely on the interpretation of the mandatory safety and health standard given by MSHA in its interim inspector's manual because MSHA should be estopped by the manual and held to its interpretation of the standard therein.[131]

The Commission acknowledged, both that the manual invited reliance and that it contained no disclaimer that it was not a binding source of law, but nonetheless rejected King Knob Coal Co.'s estoppel

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[125] *Id.* at 1416 (internal citation omitted).
[126] *See id.* at 1415-17.
[127] *Emery Mining Corp.*, 744 F.2d at 1417.
[128] *Id.*
[129] *King Knob Coal Co.*, 3 FMSHRC 1417-18.
[130] *Id.* at 1417.
[131] *Id.* at 1417-18.

argument.[132] The Commission first, and accurately, explained that the Supreme Court has taken the position that estoppel ordinarily does not apply as against the federal government.[133] Next, Commission acknowledged a trend in lower federal courts of permitting estoppel in some instances, but, because the Supreme Court had not approved this trend, stated that "fidelity to precedent [required the Commission] to deal conservatively with this area of the law."[134] Finally, the Commission stated that penalty mitigation, rather than estoppel, was a more appropriate response to regulated parties burdened by conflicting MSHA pronouncements.[135] That is, the Commission was of the opinion that fines/penalties could be reduced to account for any perceived injustice. The Commission decided *King Knob Coal Co.* in 1981, but more recent authorities confirm that it still represents the Commission's view of estoppel.[136]

C. Wholesale rejection of Equitable Estoppel is Bad Policy

Two goals support the application of estoppel against government entities, like MSHA: (1) "the government should be prevented from taking unconscionable advantage of its own wrong," and (2) "the government should be prevented from asserting legal rights where such an assertion would work a fraud or injustice on a private party acting in good faith."[137] While both of these goals would arguably be well served by requiring MSHA, rather than regulated parties, to bear the burden of conflicting or faulty pronouncements regarding jurisdiction, a third and perhaps even weightier goal would also be furthered: enhanced clarity and certainty within the OSHA/MSHA regulatory regime. In a system where regulated parties are often unable to determine what rules to follow, it stands to reason that MSHA expends considerable time and effort litigating to compel compliance with occupational health and safety standards that regulated parties might have complied with on their own if they had known they were required to do so.. Instead, the current system allows MSHA to play bait and switch with regulated parties by expressly inviting them to rely on, for example, its own view of its jurisdiction in the Interagency Agreement and Policy Manual while simultaneously claiming that neither

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[132] *Id.* at 1421-22.

[133] *Id.* at 1421.

[134] *Id.*

[135] *King Knob Coal Co.*, 3 FMSHRC at 1422.

[136] "The Commission has repeatedly held that... estoppel does not generally apply against the Secretary." *See* MSHA v. Martin Cnty. Coal Corp., 2006 WL 1814108 at *23 (2006); *see also* MSHA v.U.S. Steel Mining Co., 15 FMSHRC 1541, 1546-47 (1993) (citing MSHA v. King Knob Coal Co., 3 FMSHRC 1417, 1421-22 (1981); MSHA v. Bulk Transp. Serv., Inc., 13 FMSHRC 1354, 1361 n.3 (1991)).

[137] Laitos, Smith & Mang, *supra* note 117 at 275-76.

can be relied upon before the Federal Mine Safety and Health Review Commission.

Historically, estoppel has been greeted with skepticism when raised against a government entity because of the "pressing public interest in the enforcement of congressionally mandated public policy."[138] Many courts, as a precondition for allowing an estoppel claim against a government entity, require a balancing of the public's interest of enforcement of the congressionally mandated policy with the private interest of avoiding injustice.[139] This is a sensible and pragmatic approach; estoppel is concededly not always the appropriate response to perceived injustices when the government's ability to implement public policy is at stake. However, as previously noted with reference to *King Knob Coal Co.*, the Commission has moved beyond mere pragmatism and has instead embraced what appears to be a flat prohibition.[140] The Commission's position is defensible and, in fact, probably appropriate with regard to informal communications by MSHA officials to regulated parties regarding the existence or non-existence of MSHA jurisdiction over a given activity, such as those in *Air Products & Chemicals.*[141] However, it is much harder to justify the Commission's position on estoppel with respect to the Policy Manual and Interagency Agreement. The Policy Manual and Interagency Agreement are not fluid or ad-hoc assessments of MSHA jurisdiction by an errant MSHA official.

Estopping MSHA on the basis of the Interagency Agreement and/or Policy Manual entails very little risk that the public policy in favor of guarding against occupational hazards will be undermined. If MSHA is estopped from exercising jurisdiction in a given instance, then OSHA standards regarding occupational safety and health would still apply. Also, it should be noted that core mining activities are quite unlikely to trigger a jurisdictional dispute that might give rise to an estoppel defense. Those types of activities are squarely committed to MSHA under both the Interagency Agreement and the MSHA Policy Manual. Rather, the defense would most likely come into play with respect to activities that are on the fringe of the definition of "coal or other mine" like the off-site mineral crushing/breaking/sizing in *Herman*[142] or the road construction in *RBK Construction*[143].

Finally, if MSHA is estopped on the basis of the Policy Manual, it is not without redress. MSHA can simply alter or remove the problem language. Removal might cloud matters for regulated parties that would

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[138] United States v. Ven-Fuel, Inc., 758 F.2d 741, 761 (1st Cir. 1985).
[139] Laitos, Smith & Mang, *supra* note 117 at 280-81.
[140] *King Knob Coal Co.*, 3 FMSHRC at 1417-18.
[141] Air Prods. & Chems. v. MSHA, 15 FMSHRC 2428-29 (1993).
[142] Herman v. Associated Elec. Coop, Inc., 172 F.3d 1078, 1080 (8th Cir. 1999).
[143] MSHA. v. RBK Constr., 15 FMSHRC 2099, 2100 (1993).

otherwise look to the Policy Manual or Interagency Agreement for guidance, which would be regrettable. But, this is preferable to being lulled into reliance on a pronouncement from MSHA concerning its jurisdiction that MSHA is free to ignore at its convenience. It may be desirable for MSHA to exercise broad jurisdiction, but it need not be given free rein to take inconsistent positions regarding its jurisdiction in official pronouncements that invite reliance by regulated parties. Also, while it does not follow from the fact that MSHA sometimes takes inconsistent positions that it is MSHA's objective to mislead,[144] condoning this result stinks of Justice Jackson's "administrative authoritarianism."[145]

V. CONCLUSION

In the current regulatory environment, it is important that parties who may be subject to MSHA jurisdiction exercise caution. There are two reasons for this: (1) the guidance provided by the Interagency Agreement and/or MSHA Policy Manual may be cold comfort; and (2) if history is any indication, neither the Commission nor the federal judiciary will welcome equitable estoppel arguments from those who get it wrong. Looking forward, public policy would be better served by less judicial and administrative hostility to equitable estoppel defenses where MSHA has taken a position regarding the reach of its own jurisdiction in enforcement proceedings that is inconsistent with a view it has taken in official pronouncements like the Interagency Agreement and/or MSHA Policy Manual.

MSHA has a very important role to play in ensuring that miners can pursue their trade in relative safety. This note does not take the position that contracted MSHA jurisdiction is an end to itself. Rather the current jurisdictional framework is unpredictable, promotes bait and switch tactics, and leads to outcomes that are inefficient for both MSHA and regulated parties alike. If estoppel is credited as a viable defense, then one would expect to see MSHA try to reconcile the positions it takes regarding its jurisdiction in enforcement proceedings with the position it takes in official

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[144] My research does not compel the conclusion that it is MSHA's objective and/or agency culture to mislead regulated parties. Rather, to the extent that regulated parties are misled, this is more likely due to the fact that decision-making at MSHA occurs at multiple levels. An MSHA inspector that issues a citation to a regulated party may well believe in good faith that MSHA has jurisdiction on the basis of the Interagency Agreement and Policy Manual. However, in a later regulatory enforcement proceeding, it is more expedient for MSHA to argue that the Policy Manual and Interagency Agreement are non-binding than it is for MSHA to argue that it has jurisdiction on the basis of these documents. This note only takes the position that MSHA should be required to meet such arguments on their own terms as opposed to rejecting the Interagency Agreement and Policy Manual as non-binding. Regulated parties would still be required to show that MSHA is without jurisdiction on the basis of the Interagency Agreement and Policy Manual.

[145] *See* SEC v. Chenery Corp., 332 U.S. 194, 216-17 (1947) (Jackson, J., dissenting).

pronouncements. With greater transparency, regulated parties should have less need for estoppel and MSHA should have more resources at its disposal. In the long term, it may be worthwhile for Congress to consider revisiting the statutory definition of "coal or other mine".[146] MSHA's formulation of its jurisdiction, that it "has jurisdiction over operations whose purpose it is to produce or extract a mineral,"[147] is an elegant solution. Codifying it in the Mine Act would obligate courts and administrators to interpret and develop it further.

[146] *See* 30 U.S.C. § 802(h)(1) (2006).
[147] PROGRAM POLICY MANUAL, *supra* note 10.